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Ricci v. DeStefano: Lost at the Intersection

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RICCI V. DESTEFANO: LOST AT THE INTERSECTION

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ABSTRACT

The contestation over the *Ricci* decision largely framed the question as whether New Haven's action, cancelling the promotional lists for the fire department, was justified by the desire to avoid disparate impact liability or was an improper form of discrimination against whites. While critics cited evidence of racial disparity in the supervisory ranks as legitimate grounds for the city's decision, supporters rejected the relevance of these claims, with both sides largely focused on patterns of underrepresentation of Black and Latino men. However, this analysis rendered invisible the interlocking systems of race and gender discrimination that worked to almost totally exclude women of color from the New Haven Fire Department, producing patterns even more acutely disparate. This omission not only overlooked the rights claims of women of color: The failure to excavate the intersectional impact of the city's employment practices in *Ricci* functioned to undermine and discipline anti-racist advocacy and organizing.

While women of color were invisible in public discourse over *Ricci* in one respect, in the context of the debate over the nomination of Justice Sotomayor to the Supreme Court, the *Ricci* case became a platform through which race and gender were rendered highly salient. Her identity as a Latina and her role in the federal appeals court ruling against the *Ricci* plaintiffs before consideration by the Supreme Court, were mobilized to authorize a charge of anti-white bias. During the nomination hearings, this racial narrative was inadequately contested, as there was virtually no interrogation of the presumed affiliation between white racial identity and racial neutrality on one hand, and non-white racial identity and racial bias on the other. While ultimately Justice Sotomayor's appointment was confirmed, the "lesson" the public debate conveyed may be less about majoritarian power and more about the imperatives of

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colorblindness and its role in naturalizing whiteness as a form of institutional racial privilege. Resisting this metric required an intersectional analysis of the ways in which racialized and gendered systems of power interact to enact and exploit particular vulnerabilities.

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INTRODUCTION

Ricci v. DeStefano[1] is a case that touched a racial nerve, generating heated debates about merit, fairness, and racial disparities. Doctrinally, the decision left ambiguous the rules pertaining to disparate impact as a category of antidiscrimination claims predicated on evidence of disparate effects, as distinct from disparate treatment claims that rely on proof of intentional conduct.[2] By a five-vote majority, the Supreme Court ruled that New Haven's decision to cancel fire department promotions because its evaluation process excluded virtually all the Black and Latino candidates intentionally discriminated against whites who were in line for promotion.[3] Notwithstanding the city's argument that it acted to avoid incurring disparate impact liability,[4] the Court found that the city's reliance on the racially disparate outcomes of the selection process as the reason for voiding the promotional lists amounted to an impermissible

1. 557 U.S. 557 (2009).
2. Title VII proscribes the use of formally neutral criteria and selection devices that produce significant adverse impact on protected groups, unless the employer can demonstrate that they are job related and required by business necessity and that there are no available less discriminatory alternatives. *See* 42 U.S.C. § 2000e-2(k)(1)(A) (2012). This differs from the disparate treatment cause of action, which requires proof of intentional discrimination. *See id.* § 2000e-2(a)(1).
3. *Ricci*, 557 U.S. at 561–63.
4. *Id.* at 579.

racial consideration.[5] In effect, the city's efforts to comply with Title VII's disparate impact provisions were treated as evidence that it violated Title VII's disparate treatment proscriptions. The decision not only failed to resolve questions regarding the relationship between disparate treatment and disparate impact under Title VII,[6] it also introduced uncertainty about the scope and vitality of disparate impact theory itself.[7] An avalanche of commentary and analysis ensued seeking to parse *Ricci*'s doctrinal and political implications.[8]

Yet, despite that voluminous exegesis, there are important aspects of *Ricci* that largely have been underexamined. The *Ricci* case was constructed as a debate over whether the disproportionate exclusion of Black and Latino men from supervisory jobs based on the outcome of the fire department's selection processes warranted the city's cancellation of the

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5. *Id.* at 592.

6. Kennedy's majority opinion held that the city's cancellation of the test and the promotional lists constituted illegal intentional discrimination—disparate treatment—against the *Ricci* plaintiffs because "the City made its employment decision because of race" and had not established a lawful justification for its action, as its apprehension that it would be subject to disparate impact liability had not been established by a "strong basis in evidence." *Id.* at 579–80, 592. This standard was adopted purportedly to resolve the "statutory conflict" between Title VII's disparate treatment and disparate impact provisions, but the quantum of evidence required for an employer to meet a "strong basis" remained unclear. *Id.* at 583; *see, e.g.*, Cheryl I. Harris & Kimberly West-Faulcon, *Reading* Ricci*: Whitening Discrimination, Racing Test Fairness*, 58 UCLA L. REV. 73, 101–02 (2010) (noting the uncertainty surrounding how an employer could accomplish voluntary compliance with Title VII disparate impact law). Moreover, the decision was particularly confounding because even though it held that the city could defend against any future disparate treatment claims like Ricci's if it could show a strong basis in evidence that it would be held liable for disparate impact, the ruling for Ricci on summary judgment simultaneously ignored the evidence presented by the city, and took for granted that no different arguments could have been made by minority firefighters who might have sued for disparate impact. *Ricci*, 557 U.S. at 592–93; *see also* Mark S. Brodin, Ricci v. DeStefano*: The New Haven Firefighters Case & the Triumph of White Privilege*, 20 S. CAL. REV. L. & SOC. JUST. 161, 183–88 (2011) (listing the issues with the Court's grant of summary judgment in *Ricci*). Thus, commentators have noted that the decision introduces considerable doctrinal uncertainty. *See, e.g.*, Harris & West-Faulcon, *supra*, at 101–02; Richard Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341, 1344–45 (2010) (articulating three different possible readings of the Ricci standard and explaining how the future of the disparate impact doctrine hangs on which reading is chosen, as well as the manner in which a future case is presented to the court); Nancy L. Zisk, *Failing the Test: How* Ricci v. DeStefano *Failed to Clarify Disparate Impact and Disparate Treatment Law*, 34 HAMLINE L. REV. 27, 34–46, 49–50 (2011) (analyzing the difference between the *McDonnell Douglas/Griggs* standards and the standard set forth in *Ricci* and arguing that the *Ricci* standard is both unclear and highly problematic).

7. Scalia's concurring opinion did so directly by asserting that Title VII's disparate impact and disparate treatment provisions were or would soon be at "war." *Ricci*, 557 U.S. at 595–96 (Scalia, J., concurring). The majority opinion did so by asserting that the provisions were "in conflict." *Id.* at 580 (majority opinion).

8. *See, e.g.*, Henry L. Chambers, Jr., *The Wild West of Supreme Court Employment Discrimination Jurisprudence*, 61 S.C. L. REV. 577, 587–88 (2010) (laying out the problems that could arise in various employment discrimination contexts); Ian Haney-López, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779, 1874 (2012) (arguing that *Ricci* is in effect requiring public actors and employers to "blind themselves to persistent racial discrimination"); Lawrence Rosenthal, *Saving Disparate Impact*, 34 CARDOZO L. REV. 2157, 2165 n.39 (2013) (citing several articles criticizing the *Ricci* standard); Michael K. Grimaldi, Note, *Disparate Impact After* Ricci *and* Lewis, 14 SCHOLAR 165, 179 (2011) (arguing that *Ricci* created a catch-22 in employment testing); *see also supra* note 6 and accompanying text. Joined by a co-author, Kimberly West-Faulcon, I was among those contributing to the debate. Harris & West-Faulcon, *supra* note 6, at 101–02.

promotional lists, or whether the city's actions constituted disparate treatment of white candidates on the basis of race.[9] Necessarily, the Court's affirmation of Ricci's claim entailed the construction of a racial narrative that legitimated and endorsed as fair practices that exclude Blacks and Latinos, notwithstanding less discriminatory and more accurate screening mechanisms.[10] The dispute over the Court's reading of disparate impact doctrine and its relation to disparate treatment was embedded in a contentious discourse over whether disparate impact, like affirmative action, offended principles of colorblindness and undermined merit, or whether attention to racially exclusionary effects is necessary to combat the "built-in headwinds" of structural inequality.[11]

However, the terms of this debate rendered invisible the position of women of color and the interlocking systems of race and gender discrimination that worked to exclude them nearly entirely from the New Haven Fire Department. Instead, those defending and those challenging the city's decision focused on the relative position of men of different races in the fire department's supervisory ranks. While the exclusionary "effect of the city's selection practices constituted ample evidence of a disparate impact claim,[12] and indeed, after *Ricci*, that precise case was brought by minority firefighters,[13] the underrepresentation of women generally and of women of color in particular was stark.[14] This gross disparity was not

9. There is at least one noteworthy exception. Ann C. McGinley's article is an extensive exploration of the gendered dimensions of the case and the construction of firefighting work through masculinity. *See* Ann C. McGinley, Ricci v. DeStefano*: A Masculinities Theory Analysis*, 33 HARV. J.L. & GENDER 581, 584–85 (2010).

10. *See Ricci*, 557 U.S. at 592.

11. Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971). This debate implicated competing understandings of the asserted racial neutrality of the selection process and the broader racial context, a matter that I have critiqued elsewhere. *See* Harris & West-Faulcon, *supra* note 6, at 109.

12. Title VII of the Civil Rights Act of 1964 permits plaintiffs to sue employers who discriminate against them on the basis of race, color, religion, sex, or national origin. The statute obviously applies to employers who intentionally discriminate, but the courts (and later the statute itself) also give plaintiffs standing to sue if the employer has caused classes of people to be treated differently even if the employer was using facially neutral employment policies. To prove disparate impact, a plaintiff must show that "an employment practice or policy has a disproportionately adverse effect on members of the protected class as compared with nonmembers of the protected class." EEOC v. Sambo's of Ga. Inc., 530 F. Supp. 86, 92 (N.D. Ga. 1981).

13. In *Tinney v. City of New Haven*, seven African-American firefighters in New Haven who took the same exams at issue in *Ricci*, set forth four claims against the city and the Union for equal protection, due process, and Title VII claims for disparate treatment and disparate impact. Tinney v. City of New Haven, No. 3:11-cv-1546 (SRU), 2014 WL 1315653, at *6–7 (D. Conn. Mar. 31, 2014). Briscoe was an intervenor plaintiff. In *Briscoe*, an African-American firefighter in New Haven who took the same exam at issue in *Ricci*, claimed that the city violated the disparate impact provision in Title VII by weighting the written portion higher than the oral portion of the exam. Briscoe v. City of New Haven, 3:09-cv-1642 (CSH), 2010 WL 2794212, at *3 (D. Conn. July 12, 2010), *decision clarified on reconsideration*, 3:09-cv-1642 (CSH), 2010 WL 2794231 (D. Conn. July 12, 2010), *vacated*, 654 F.3d 200 (2d Cir. 2011).

14. Only 11 out of the 411 New Haven firefighters were women. Nicole Allen & Emily Bazelon, *The Ladder: Part 2: Do White, Black, and Hispanic Firefighters in New Haven Get Along?*, SLATE (June 25, 2009, 7:17 AM), http://www.slate.com/articles/news_and_politics/jurisprudence/features/2009/the_ladder/part_2_do_white_black_and_hispanic_firefighters_in_new_haven_get_along.html. Of those, four were women of color. McGinley, *supra* note 9, at 591.

the result of "natural" preferences: It was produced by selection processes grounded in gendered and racialized presumptions that constructed firefighting as (white) men's work.[15] Women, and women of color in particular, have been excluded from firefighting for decades,[16] but this broader context of entrenched racial and sex based inequality was largely erased in the legal analysis and public debate. To identify the problems with the debate implicated in *Ricci* I draw on Kimberlé Crenshaw's critique of traditional antidiscrimination analysis that conceptualizes discrimination along a single axis, such as race or gender, and fails to attend to the intersectional and interactive nature of discrimination across multiple categories.[17] In *Ricci*, race was at the core of the case but that did not make gender irrelevant—indeed, including the experience of Black women was central to exposing the exclusionary impact and invalidity of the selection process. Unfortunately, the failure to excavate the intersectional effects of the city's employment and promotional practices in *Ricci* functioned to undermine the strength of minority candidates' antidiscrimination claims and to discipline antiracist advocacy and organizing by narrowing the way issues were framed.

On the other hand, while the legal and popular debate over the *Ricci* case lacked any meaningful attention to its gendered implications, those dimensions became highly salient during the debate over the nomination of Justice Sonia Sotomayor as the first woman of color and first Latina/o to serve on the United States Supreme Court.[18] Her public affirmation of her identity as a Latina and her decision against the *Ricci* plaintiffs, rendered while she served on the Second Circuit Court of Appeals, were mobilized in support of the charge that she was racially biased against whites.[19] Sotomayor's racial and gender identity and her self-aware subjectivity denied her the presumption of judicial objectivity accorded to whites. Notably, this presumption obtained even against the background of past and ongoing practices that favored white candidates and had constructed the judiciary as a white male institution for decades.[20] While the Democratic majority in the Senate made it likely that Sotomayor would be confirmed, the opposition was successful in framing the debate on her nomination around the presumed affiliation between white racial identity and racial neutrality on the one hand, and non-white racial identity and racial bias on the other.[21] Left virtually uncontested, these presuppositions reconfigured even a moderate Justice like Sotomayor into a reverse

15. *See infra* Part I.

16. *See infra* Part I.

17. *See* Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Policies*, 1989 U. CHI. LEGAL F. 139, 139–40.

18. *See infra* Part II.

19. *See infra* Part II.

20. *See infra* Part II.A.

21. At the time of Justice Sotomayor's nomination, Democrats comprised a majority of the US Senate. *See infra* Part II (discussion of the nomination).

racist and severely circumscribed the terms upon which racial reform and antidiscrimination law could be defended.

These constraints had implications beyond the Sotomayor nomination: While presidential nominees to judicial and cabinet positions with civil rights affiliations have suffered delays and derailments because of the entrenched political struggle between the President and his political opponents, a central narrative of that opposition defines those affiliations as compelling evidence of pro-minority and anti-white bias.[22] In this sense, Sotomayor's confirmation is less an illustration of majoritarian power and is more demonstrative of the imperatives of colorblindness as a legitimate litmus test of objectivity and judicial temperament and a presumed characteristic of whites. Defending Sotomayor did not require portraying her as "less Latina" but rather challenging the assumption that whiteness constitutes a race-neutral baseline against which people of color are legitimately adjudged to be wanting. An intersectional analysis of racial and gendered power illuminates how these presumptions are produced and how particular (racialized) identities are constructed as inherently biased. This would have facilitated the reframing of the debate over Sotomayor's nomination so as to interrogate the racial presumptions that align whiteness with objectivity and non-whites with bias. Engaging this argument was important to Sotomayor's confirmation and to securing political space for future nominees of color as well as those whose commitments have aligned with seeking racial justice.[23]

I argue that the invisibility of discrimination against women of color in the public and legal debate over *Ricci* and the deployment of *Ricci* as evidence of the purported threat that Justice Sotomayor posed to judicial objectivity are symptomatic of the limitations of current racial frameworks. These constraints also affect dimensions of antiracist and antidiscrimination advocacy. At one level, both these aspects of *Ricci* illustrate why intersectional analysis must be summoned: Exposing systems of racial and gender power is critical to addressing inequality in all its myriad forms.

In Part I, I map *Ricci*'s invisible intersections, examining the conditions of women of color in the New Haven Fire Department. I situate the condition of women of color in the context of broader patterns of severe underrepresentation of women of color in fire departments nationally. I note particularly how the traditional selection practices of urban fire de-

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22. *See infra* Part II.

23. *See* Joel Marrero-Otero, Comment, *What Does a Wise Latina Look Like? An Intersectional Analysis of Sonia Sotomayor's Confirmation to the U.S. Supreme Court*, 30 CHICANA/O-LATINA/O L. REV. 177, 197–99 (2011); Kimberlé Crenshaw, *In Her Judgment*, N. Y. TIMES, Oct. 12, 2014, at BR17 (reviewing JOAN BISKUPIC, BREAKING IN: THE RISE OF SONIA SOTOMAYOR AND THE POLITICS OF JUSTICE (2014)); Sherrilyn A. Ifill, Op-Ed., *A Failed Conversation—GOP Assertions to the Contrary, The Sotomayor Hearings Shed Little Light on Either Race or Justice*, BALT. SUN, July 23, 2009, at 17A.

partments, like those in New York and Los Angeles, work to produce racialized and gendered exclusion. Deploying an intersectional analysis, I illustrate how the marginalization of the experiences of women of color in opposition to that exclusion conspires to effectively isolate their rights claims and enacts a constrained form of antiracist and feminist politics. This disaggregation is inherent in the structure of antidiscrimination law and is reproduced in legal and political advocacy that ignores the relationship between racial and gender exclusion.[24]

Part II examines how the *Ricci* case figured in the debate over the nomination of Justice Sonia Sotomayor to the United States Supreme Court. Unlike the invisibility of race and gender intersections in the debate over the case, the hearings on the Sotomayor nomination rendered race and gender highly visible in service of the charge of racial discrimination against whites. While initially Sotomayor's nomination was celebrated, particularly among Latino communities, she was soon subjected to the criticism that she held racial animus against whites.[25] The Supreme Court's reversal of her decision in *Ricci* became evidence of this alleged bias. In this sense Sotomayor's identity as a Latina, together with her decision in *Ricci,* facilitated the invocation of racialist tropes that equated non-white racial identity and civil rights advocacy with racism against whites.[26]

I conclude by considering how the debate over *Ricci* both as a legal dispute and its symbolic meaning in the nomination of Sotomayor illuminates some of the costs of omitting an intersectional analysis. The erasure of women of color as legitimate stakeholders in the debate over equal opportunity undermined the ability to challenge the presumptions

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24. *See* Crenshaw, *supra* note 17, at 141–50; *see also* Devon W. Carbado & Mitu Gulati, *The Fifth Black Woman*, 11 J. CONTEMP. LEGAL ISSUES 701, 708–719 (2001); Judith A. Winston, *Mirror, Mirror on the Wall: Title VII, Section 1981, and the Intersection of Race and Gender in the Civil Rights Act of 1990*, 79 CAL. L. REV. 775, 796–801 (1991); Peggie R. Smith, Comment, *Separate Identities: Black Women, Work, and Title VII*, 14 HARV. WOMEN'S L.J. 21, 21–25 (1991).

25. Peter Baker, *Court Choice Pushes Issue of 'Identity Politics' Back to Forefront*, N. Y. TIMES, May 31, 2009, at A20 ("Critics took issue with her past statements and called her a 'reverse racist.'"); Tom Goldstein, Op-Ed., *Her Justice is Blind*, N. Y. TIMES, June 16, 2009, at A21 ("Some infer from [Sotomayor's decision in *Ricci v. DeStefano*] that Judge Sotomayor must be biased against whites."); Ifill, *supra* note 23, at 17A ("[*Ricci*] involved the inflammatory issue of race . . . [a]nd so, ignoring thousands of decisions in which Judge Sotomayor has participated, they undertook to paint the nominee as a dangerous racial partisan."); Ruben Navarrette Jr., Op-Ed, *Latina Had to Calm Whites' Racial Fears – Watching Sotomayor*, LEXINGTON HERALD-LEADER (Ky), July 19, 2009, at D4 ("Republicans have two basic objections to Sotomayor – That she'll make decisions based on 'empathy,' and that those decisions will reveal what Senate Minority Leader Mitch McConnell described recently as a racial bias."); Chuck Raasch, Op-Ed., *A Different View on Judicial Activism*, USA TODAY (July 1, 2009, 1:49 PM), http://usatoday30.usatoday.com/news/opinion/columnist/raasch/2009-07-01-raasch-column-07012009_N.htm ("After the *Ricci* decision was announced, a coalition of right-leaning lawyers and activists . . . [said] that the decision 'calls into question whether Sotomayor is capable of treating all Americans fairly and equally.'"); Peter Wallsten, *Republican Senators Alter Course on Nominee*, L. A. TIMES, June 1, 2009, at A10 ("Republican senators . . . have lashed out at conservatives in their party who branded the would-be justice a racist . . . .").

26. *See infra* Part II.A.

of colorblindness that legitimated racially exclusionary practices as fair and affirmed a presumed affiliation between whiteness and neutrality and objectivity. This omission obscured crucial legal and political terrain, hampered coalitional possibilities, and diluted the power of civil rights claims.

I. INVISIBLE INTERSECTIONS

In this Part I review the facts of the *Ricci* case. Drawing on Kimberlé Crenshaw's theoretical framework of intersectionality,[27] I consider the employment record of the New Haven Fire Department in the broader context of widespread patterns of gender and racial exclusion in fire departments nationally. New Haven's practices, while facially neutral, systematically excluded women and minorities.[28] Like other fire departments, New Haven's procedures had been successfully challenged under Title VII's disparate impact framework.[29] Historically, the experience of women and women of color was central to efforts to strengthen disparate impact law in the 1991 Civil Rights Act after the Supreme Court had weakened it.[30] Thus the erasure of women of color from the public debate over *Ricci* was deeply ironic. More significantly, the failure to include the experience of women of color occluded their lived experience and removed from antidiscrimination advocacy evidence that supported the city's decision to reject the results of the department's exclusionary selection procedures. An intersectional analysis would have illustrated why the disparate impact claim was legally viable and thus justified the city's rejection of the promotional lists. Not only did the selection proce-

27. *See* Crenshaw, *supra* note 17.

28. *See infra* notes 42–62 and accompanying text.

29. *See infra* notes 40–47 and accompanying text.

30. The Supreme Court's decision in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074, *as recognized in* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011), held that in proving disparate impact liability plaintiffs were required to establish racial disparity in hiring patterns with greater specificity and that the disparities were the result of specific hiring practices of the employer. The employer's rebuttal burden was also reduced from a burden of persuasion to a burden of production and from demonstrating job-relatedness and business necessity to "a reasoned review of the employer's justification." *Id.* at 659. This case was widely viewed as dramatically increasing the burden of proof on plaintiffs in discrimination cases and undermining the ability of plaintiffs to secure relief. *See* Michael K. Braswell, Gary A. Moore & Bill Shaw, *Disparate Impact Theory in the Aftermath of* Wards Cove Packing Co. v. Atonio*: Burdens of Proof, Statistical Evidence, and Affirmative Action*, 54 ALB. L. REV. 1, 1–3 (1989); John Shavers, Jr., Wards Cove Packing Co. v. Atonio*: A Departure From the Intent of Title VII of the Civil Rights Act of 1964*, 17 S.U. L. REV. 133, 145–47 (1990). Congress responded to *Wards Cove* and other decisions weakening civil rights laws by enacting the Civil Rights Act of 1991. *See* Peter M. Leibold, Stephen A. Sola & Reginald E. Jones, *Civil Rights Act of 1991: Race to the Finish—Civil Rights, Quotas, and Disparate Impact in 1991*, 45 RUTGERS L. REV. 1043, 1083–84 (1993). Hearings on the Civil Rights Act of 1991 included and relied heavily on the testimony from women and minority firefighters who recounted discriminatory practices that continued well after the enactment of the 1972 amendments. *See The Civil Rights Act of 1991: Hearings on H.R. 1 Before the H.R. Comm. on Educ. & Labor*, 102d Cong. 379–87 (1991) [hereinafter *Civil Rights Act Hearings*] (reporting the testimony of Brenda Berkman, President of the United Women Firefighters, regarding the history of litigation against the New York fire department for the use of criteria that unnecessarily screened out qualified women candidates and her subsequent termination in retaliation for playing a role in the lawsuit).

dures negatively impact Black and Latino males on the New Haven Fire Department, women and women of color were severely affected as well.[31] This analysis was crucial to making the case that the underrepresentation of minorities and women was symptomatic of discrimination and not simply the product of natural distribution or individual preferences.

A. Intersectionality: Exposing the Interactive Mechanisms of Exclusion

The erasure of the experience of women of color from legal and political narratives of discrimination is related to, and is in part a product of, the limitations of antidiscrimination law and discourse. Kimberlé Crenshaw's work has critiqued the ways in which the framework of antidiscrimination law and politics has depended upon a conception of racism and sexism that marginalizes Black women. In *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Policies*, she pointed out that courts disallowed the employment discrimination claims of Black women as Black women and further disallowed Black women from serving as class representatives in suits involving race or sex discrimination.[32] Both traditional legal frameworks and organizational politics tended to be based on narratives that disaggregated race and gender identities and experiences.[33] Thus, not only were Black women's specific injuries invisible within the given structure of antidiscrimination law, but they were deemed unable to represent women in sex discrimination claims or to represent Blacks in race discrimination claims— they were different from how difference had been doctrinally categorized— precisely because their experience could not be marked along a single axis.[34] This not only obscured the experience of women of color but the interactive and interlocking nature of forms of oppression as well.

Crenshaw's move to bring the politics of Black feminism into law was a crucial part of Critical Race Theory's challenge to limited concep-

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31. *See infra* notes 53–60.

32. *See* Crenshaw, *supra* note 17, at 141–50 (describing case law in which Black women's charges of employment discrimination were rejected).

33. *See id.* at 150.

34. *See id.* at 148–49. As Crenshaw put it:

> Black women were harmed both by being treated as though they were the same and by being treated as though they were different. There was no simple, once and for all, solution because the nature of the discrimination faced by these Black female plaintiffs was not a simple, once and for all, event. Indeed, as the cases revealed, there were numerous ways that Black female plaintiffs experienced discrimination; the point of the intersectional metaphor was to draw attention to the multiple ways that patterns of power can converge. Its corollary was to argue both against the elision of difference where it makes a difference, and against fetishizing difference where it does not.

Kimberlé W. Crenshaw, *Close Encounters of Three Kinds: On Teaching Dominance Feminism and Intersectionality*, 46 TULSA L. REV. 151, 165 (2010).

tions of antidiscrimination law itself.[35] Intersectionality constituted a way to describe how Black women were positioned—or more specifically, marginalized—under Title VII, not as a way of marking particularity for its own sake, but as a predicate to addressing a set of conditions that rendered multiple social groups vulnerable to subordination. Dismantling these interlocking forms of subordination required a fundamental challenge to prevailing legal and political conceptions of discrimination. Broadly put, the dominant paradigm of antidiscrimination law defined discrimination as race- or sex-based departures from otherwise neutral baselines and processes.[36] This bias-focused model ignored, and largely obscured, the way that racism and patriarchy worked in tandem to exclude women of color and to embed and normalize white and male privilege in social practices, interactions, and institutions.[37] While disparate impact doctrine did attend to precisely those neutral factors that constituted and constructed significant headwinds, the prevailing framework privileged a single axis, bias-based approach. As Crenshaw put it, this model was decidedly deficient:

> This process-based definition is not grounded in a bottom-up commitment to improve the substantive conditions for those who are victimized by the interplay of numerous factors. Instead, the dominant message of antidiscrimination law is that it will regulate only the limited extent to which race or sex interferes with the process of determining outcomes. This narrow objective is facilitated by the top-down strategy of using a singular "but for" analysis to ascertain the effects of race or sex. Because the scope of antidiscrimination law is so limited, sex and race discrimination have come to be defined in terms of the experiences of those who are privileged *but for* their racial or sexual characteristics. Put differently, the paradigm of sex discrimination tends to be based on the experiences of white women; the model of race discrimination tends to be based on the experiences of the most privileged Blacks.[38]

Intersectionality then identified the deficiencies of the traditional model not only to critique the erasure of Black women's experience in

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35. *See* Crenshaw, *supra* note 17, at 140, 154, 162 (referencing Black feminism as a challenge to racism, patriarchy, heteronormativity, and economic inequality). This was part of the broader Critical Race Theory project, which in contrast to traditional models that conceived of race as a phenomenon entirely external to law, saw law and legal doctrine as an ideological narrative about what race and racism are. In constructing racism as aberrational, individual and intentionally driven, antidiscrimination law and models were inherently limited and flawed, and failed to consider the endemic, structural, and automatic nature of racial subordination. *See Introduction* to CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT, at xiii–xxxii (Kimberlé Crenshaw et al. eds., 1995).

36. Crenshaw, *supra* note 17, at 151.

37. *Id.* at 152.

38. *Id.* at 151.

antidiscrimination law, but to expose the inadequacy of the traditional antidiscrimination paradigm in addressing subordination. Notably, these deficiencies were not confined to law: Antiracist and feminist politics reproduced the "but for" logic inherent in antidiscrimination law defining discrimination as a deviation from an otherwise neutral norm on the basis of some singular characteristic, with often devastating consequences.[39] Thus, women of color were not seen as authentic representatives of an antiracist agenda, nor were their concerns legible within feminist politics.

Thus, when minority firefighters and their advocates failed to include the experiences of women of color as part of their response to the *Ricci* case, the claim that the fire department's practices constituted discriminatory conduct under Title VII's disparate impact provisions was weakened. Focusing on the experiences of women of color not only would have illuminated the exclusionary nature of the city's promotional policies, it would have created the conditions of possibility for a broader and more robust coalitional effort among women of all races and men of color to respond to the litigation. I am not arguing that a more inclusive narrative about the impact of the department's practices would have changed the outcome of the case. Instead, I posit simply that a different framework would have helped contest the presumption that the test components, test weighting and ranking were all neutral, fair, and necessary, which was how the case was cast in the public debate.

B. Ricci*—The Missing Data and Analysis*

The New Haven Fire Department, like most urban fire departments, had a long history of racial exclusion.[40] After years of litigation and organizing, the number of minority firefighters began to increase, but the supervisory positions remained predominately white.[41] Thus, at the time of the *Ricci* litigation, Blacks were 32% of the entry-level positions in the New Haven Fire Department but only about 9% of the supervisory positions.[42] Latinos were 16% of entry-level positions[43] and about 9% of

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39. *See* Kimberlé Crenshaw, *Whose Story Is It, Anyway? Feminist and Antiracist Appropriations of Anita Hill*, *in* RACE-*ING* JUSTICE, *EN*-GENDER*ING* POWER 402, 416–417 (Toni Morrison ed., 1992) (describing how in the debate over the nomination of Clarence Thomas to the Supreme Court, the sexual harassment of Anita Hill was reconfigured as a "high-tech lynching," effectively allowing him to garner greater support as a victim of racial discrimination, erase Anita Hill as a Black woman, and secure his appointment (internal quotation marks omitted)); *see also* Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1990) (describing how feminist antiviolence campaigns and organizing often fail to consider the position of women of color).

40. *See* Firebird Soc'y v. Members of the Bd. of Fire Comm'rs, 556 F.2d 642 (2d Cir. 1977) (Black firemen suing New Haven for discriminatory practices in hiring and promotions); Brantley v. City of New Haven, 364 F. Supp. 2d 198 (D. Conn. 2005) (Black plaintiff suing New Haven for discriminatory firing); New Haven Firebird Soc'y v. Bd. of Fire Comm'rs of New Haven, 593 A.2d 1383 (Conn. 1991) (plaintiffs suing New Haven for discriminatory promotion practices).

41. Ricci v. DeStefano, 557 U.S. 557, 610–11 (2009) (Ginsburg, J., dissenting).

42. A brief filed in support of the Respondents stated:

> Of thirty-two officers at the level of captain or higher, there were just three African Americans and three Hispanics in 2005.

the supervisory positions.[44] These imbalances were the result of prior selection procedures for supervisory positions that had been held legally invalid. In 1973, the Firebirds sued the city for a pattern of willful discrimination in hiring and promotion.[45] The suit ended in a consent decree that improved entry-level hiring, but the upper ranks remained mostly white.[46] In two subsequent cases, minorities successfully challenged the department's promotional policies as violative of civil service procedures as well.[47]

When the city sought to fill fifteen vacant supervisory positions, it hired a professional test developer who constructed two written tests that were administered to 118 applicants.[48] Additionally, all candidates were given an oral exam, and after both components were scored, the tests were weighted—60% for the written portion and 40% for the oral portion—pursuant to the union contract, and a composite score was recorded.[49] While there were Black candidates who had higher written or oral scores than some white candidates, the weighting produced a list in which no Black and only two Latino candidates would be eligible for promotion.[50] The city's concern was that given the test's extreme impact,

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> . . . According to New Haven's . . . EEO-4 data, in 2007, African Americans held 32% of entry-level positions in the fire department, but only 15% of supervisory positions.

Brief for NAACP Legal Defense & Education Fund, Inc. as Amici Curiae Supporting Respondents at 17, Ricci v. DeStefano, 557 U.S. 557 (2009) (Nos. 07-1428, 08-328) (footnote omitted); *see also* Allen & Bazelon, *supra* note 14.

43. In her dissent, Justice Ginsburg stated:

> As of 2003, African-Americans and Hispanics constituted 30 percent and 16 percent of the City's firefighters, respectively. In supervisory positions, however, significant disparities remain. Overall, the senior officer ranks (captain and higher) are nine percent African-American and nine percent Hispanic. Only one of the Department's 21 fire captains is African-American.

Ricci, 557 U.S. at 610–11 (Ginsburg, J., dissenting).

44. *Id.* A few years later, in 2009, *Slate* reported that, "[o]ut of 411 firefighters in the city, only 50 are Hispanic—12 percent, in a city where there are twice as many Hispanics." Allen & Bazelon, *supra* note 14.

45. Firebird Soc'y of New Haven, Inc. v. New Haven Bd. of Fire Comm'rs, 66 F.R.D. 457 (D. Conn. 1975), *aff'd mem.*, 515 F.2d 504 (2d Cir. 1975). The Firebird Society of New Haven is an organization of Black and Hispanic firefighters. It was started in 1971 and was instrumental during the 1970s in the litigation that resulted in the New Haven Fire Department changing its hiring policies to increase the number of minority firefighters. They are a member of the International Association of Black Professional Firefighters, and their current membership is about sixty firefighters. *See History of The Firebird Society of New Haven*, NEW HAVEN FIREBIRDS, http://www.newhavenfirebirds.com/the-firebird-society-of-new-haven-inorporated-history.html (last visited Nov. 29, 2014); *see also Active Members*, NEW HAVEN FIREBIRDS, http://www.newhavenfirebirds.com/active-members.html (last visited Nov. 29, 2014).

46. *Id.* at 463.

47. *See* Broadnax v. City of New Haven, 851 A.2d 1113, 1136 (Conn. 2004) (finding that the practice of using lower ranked white officers to fill positions budgeted for higher rank was unfairly increasing the number of whites placed into the candidate pool for promotions in violation of civil service rules); New Haven Firebird Soc'y v. Bd. of Fire Comm'rs of New Haven, 593 A.2d 1383 (Conn. 1991) (holding that disproportionate promotion of whites to positions not yet vacant was violative of civil service rules).

48. *Ricci*, 557 U.S. at 562–66.

49. *Id.* at 564.

50. *Id.* at 589.

and that neither the content nor the scoring process could be justified as valid measures of job-related merit, minority candidates would challenge the selection process as racially exclusionary and not warranted by business necessity.[51] The worry was particularly acute because the city, through its lawyer, was aware that other municipalities had used different assessment procedures that produced more racially diverse results.[52]

The case that the city's practices produced impermissible disparate impact rested entirely on the underrepresentation of Black and Latino men in the supervisory ranks: The even more severe underrepresentation of women of color, both in the fire department as a whole and in the supervisory ranks, was invisible. Out of the 411 firefighters employed by the city at the time only eleven were women, and of those, seven were white, four were Black.[53] There were no Latinas. None of the three women who took the promotional exams in 2003 qualified for advancement: Two failed the lieutenant's exam, and the one who took the captain's exam passed but was not promoted based on where she fell in the rankings.[54] This fact was overlooked in the vast majority of news articles on the case.[55] One notable exception was part of a multi-part series published in *Slate* in which the reporter interviewed Erika Bogan, a Black woman firefighter and one of the leaders of the Firebirds, the local branch of the international Black firefighters association.[56] Bogan was outspoken about the way that race mattered in the New Haven Fire Department, noting that race was highly correlated with place of residence: Many white firefighters resided outside of New Haven in virtually all-white suburbs, while Black firefighters tended to live in New Haven,[57] a majority non-white city.[58] Bogan contended that as a result white firefighters related very differently to the neighborhoods they were assigned to protect:

> Bogan says that when black kids peek into the Howard Avenue firehouse, oohing at the trucks, she and her fellow black

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51. *Id.* at 563.

52. *Id.* at 572–73.

53. *See* McGinley, *supra* note 9, at 591 & n.79 (citing chart provided by Victor Bolden, Corporation Counsel for City of New Haven); Allen & Bazelon, *supra* note 14 ("There is only one woman on the Howard Avenue shift with Neal and Heins. Erika Bogan, who is black, is one of 11 female firefighters in the entire city. (That's a whole different subject.)").

54. *See* McGinley, *supra* note 9, at 590–91.

55. *See id.* at 616–18 (noting the absence of women's stories and testimony about the case).

56. Allen & Bazelon, *supra* note 14.

57. *Id.*

58. New Haven's population is over 50% Black and Latino. *New Haven (city), Connecticut, QuickFacts*, UNITED STATES CENSUS BUREAU, http://quickfacts.census.gov/qfd/states/09/0952000.html (last updated Jul. 8, 2014). The city was also over 50% Black and Latino in 2003 when the dispute in *Ricci* arose. *See New Haven, Connecticut Population: Census 2010 and 2000 Interactive Map, Demographics, Statistics, Quick Facts*, CENSUSVIEWER, http://censusviewer.com/city/CT/New%20Haven (last visited Oct. 25, 2014) (showing that in 2000, the census reported that the Black population of New Haven was 37% and the Latino population was 21%).

> firefighters like Mike Neal scoop them up and take them inside. But the suburban white guys, she says, ignore the kids. She said she has also heard them joke on the phone about "working in the ghetto." "How dare you, when you live in Madison or Guilford, come in here and take our money and go back to your communities and talk shit about New Haven?" she asked.[59]

Like many municipal fire departments, the number of women (2.6%) and women of color (0.9%) on the New Haven Fire Department approached "the inexorable zero."[60] Indeed, these numbers were substantially lower than the number of women or women of color in the relevant labor market—the number of a group qualified and available to perform a specific job in a particular area.[61] According to a national study done in 2008, the expected female representation in firefighting jobs is 17%; the number for women of color is 5.9%.[62] As of 2012, only 3.4% of firefighters are women and only 0.8% of firefighters are women of color.[63] Critics of these disparity analyses have contended that low numbers simply reflect women's disinterest in firefighter jobs. However, the report points out that the utilization analysis includes adequate controls for interest: These figures are derived from counting the number of women in the relevant age group with a high school diploma in the labor market, and of that number, examining the proportion of women who perform physically demanding or "dirty" jobs, such as welders, construction workers, and the like.[64] Because women make up about 17% of these comparable jobs, a reasonable expectation is that they would be a similar proportion of the firefighting workforce as well.[65] The fact that New Ha-

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59. Allen & Bazelon, *supra* note 14.

60. *See id.*; *see also* McGinley, *supra* note 9, at 591 (citing chart provided by Victor Bolden, Corporation Counsel for City of New Haven). The term "inexorable zero" is from *Teamsters*, in which the court ruled that the severe underrepresentation—the inexorable zero— created a presumption of discrimination. United States v. T.I.M.E.-D.C. Inc., 517 F.2d 299, 315 (5th Cir. 1975), *vacated sub nom.*, Int'l Bhd. of Teamsters v. United States, 431 U.S. 324 (1977).

61. Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 308 n.13 (1977).

62. DENISE M. HULETT ET AL., A NATIONAL REPORT CARD ON WOMEN IN FIREFIGHTING 1–2 (2008), *available at* http://www.i-women.org/wp-content/uploads/2014/07/35827WSP.pdf. In 2012, 3.4% of firefighters were women, 7.7% of firefighters were Black, and 9.9% of firefighters were of Hispanic origin. Nat'l Fire Prot. Ass'n, *Firefighting Occupations by Women and Race*, NFPA.ORG, http://www.nfpa.org/research/reports-and-statistics/the-fire-service/administration/firefighting-occupations-by-women-and-race (last visited Aug. 19, 2014).

63. HULETT ET AL., *supra* note 62, at 2; NPFA supra note 62.

64. The study computed the number "of women in the nation's labor force of typical firefighter age (20–49) and educational background (high school graduate but no college degree), working full time in one of 184" professions, which had similar strength, stamina, and dexterity requirements as firefighting does. These "occupations include[d] bus mechanics, drywall installers, enlisted military personnel, highway maintenance workers, loggers, professional athletes, refuse collectors, roofers, septic tank servicers, tire builders, and welders." *Id.* at 1.

65. *Id.*

ven's numbers are so low reflects significant underutilization by both race and gender.[66]

While it is obvious why New Haven might not highlight these stark gender and race disparities, it is less clear why advocates for minority firefighters did not make more of this sorry record. Even absent knowing the precise number of women of color in New Haven's relevant labor market, there is reason to surmise that the percentage of women of color employed by the New Haven Fire Department would exceed national estimates because New Haven's population is and historically has been predominately non-white.[67] That would suggest that the underutilization is even more profound. While the central issue in the case involved promotions as distinct from hiring, the pattern of underutilization would have had salience in the case and could have strengthened the argument that the New Haven Fire Department's selection practices were flawed, and not fair and neutral as Ricci claimed. Indeed, these numbers constituted a compelling signal that the procedures violated Title VII's disparate impact provisions. Marc Bendick, an employment economist and one of the researchers in a national study, has explained the relationship between underrepresentation and discrimination:

> Research has determined that, in fire departments where women are given fair, equal, non-hostile treatment in recruitment [and] training, . . . it is reasonable to expect a fire department's uniformed firefighters and officers to include about 17% women.
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> . . . .
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> . . . When a fire department employs women at a rate much lower than 17% . . . that outcome is directly traceable to a departmental culture in which hostility, discrimination, harassment and exclusion operate and are tolerated, implicitly and explicitly, by departmental leadership.[68]

A discussion of why there were so few women, and women of color specifically, also would have advanced a more robust and compelling narrative about exclusion and subordination would challenge the dominant view that the disparate impact claims of minorities and women were simply a form of seeking preferential treatment.

From the vantage point of the city and advocates for minority firefighters, it was critical to explain why the city cancelled the results of the selection procedures. The experience of women of color was an im-

66. *See id.*; *see also* Allen & Bazelon, *supra* note 14.

67. *See supra* note 58 (reporting Census figures).

68. Marc Bendick, Jr., Principal, Bendick & Egan Economic Counsultants, Inc., What Research Tells Us About Women in Firefighting: Testimony before the City Council of N.Y.C. 1–2 (Dec. 13, 2013), *available at* http://www.bendickegan.com/pdf/Bendick_NY_Firefighter_Testimony_December_2013.pdf.

portant part of that explanation. While the dominant narrative was that the procedures were fair and that the city simply rejected an outcome it did not like, in fact New Haven's selection processes, like those of many fire departments, were structured in a way that reproduced gross racial and gender disparities. Repeated legal challenges demonstrated that competency was not simply determined by a set of objective criteria evenly applied, as both physical and written exams had been shown to include discriminatory and unnecessary metrics.[69] Specifically, multiple-choice tests, like that administered by New Haven, have been critiqued as an invalid measure of the skills necessary to do the job of captain or lieutenant, as they fail to identify "leadership skills," "command presence" skills, and abilities that fire officers must possess.[70] Additionally, the tests were structured around memorization of fire terms and procedures of fire suppression that did not incorporate other aspects of the job that include emergency medical services, as fire departments have taken over these tasks, as well as fire safety inspections and investigations.[71]

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69. *See, e.g.*, Boston Chapter NAACP, Inc. v. Beecher, 504 F.2d 1017, 1024–25 (1st Cir. 1974) (ruling that the state firefighter's exam, which had an adverse impact on minorities and women, "was not professionally developed; its content does not appear to be job related; the cutoff score of 70 is arbitrary; the validation study reveals no correlation to overall measures, either subjective or objective, and only minimal correlation to two individual objective tasks"); Hayden v. Cnty. of Nassau, 180 F.3d 42, 46–47 (2d Cir. 1999) (upholding efforts by the police department to switch from multiple-choice exams that created substantial underrepresentation of women and minorities to a new test that was job related and minimized adverse impact on minorities); United States v. City of New York, 683 F. Supp. 2d 225, 238, 262 (E.D.N.Y. 2010), *vacated*, 717 F.3d 72 (2d Cir. 2013) (finding that the city's firefighter exam "did not actually test for the job-related abilities they were intended to test for," "the examinations were written at an unnecessarily high reading level," and "the chosen cutoff scores for the examinations did not bear any relationship to the necessary job qualifications"; and further characterizing the city's firefighting policies as "34 years of intransigence and deliberate indifference"); *Civil Rights Act Hearings*, *supra* note 30, at 383–84 (testimony of Brenda Berkman, President, United Women Firefighters). It is also worth noting "that prior to 1972, most police departments and many fire departments never had a physical performance test as part of their selection criteria." *See* Event, *Taking the Heat: Gender Discrimination in Firefighting*, 17 AM. U. J. GENDER SOC. POL'Y & L. 713, 717 (2009) (remarks by Professor Richard Ugelow).

70. These skills are critical to the successful performance of the supervisory jobs. *See* Brief of Industrial-Organizational Psychologists as Amici Curiae in Support of Respondents at 11, Ricci v. DeStefano, 557 U.S. 557 (2009) (Nos. 07-1428, 08-328) ("Leadership in emergency-response crises requires expertise in fire-management techniques and sound judgment about life-and-death decisions. . . . Simply put, command presence is a hallmark of a successful fire officer. Virtually all studies of fire management emphasize that command presence is vital to the safety of firefighters at the scene and to the successful accomplishment of the firefighting mission and the safety of the public." (citation omitted)). However, written multiple choice tests are not good measures of these skills. *See id.* at 15 ("It is well-recognized by I/O psychologists and firefighters alike that written, pencil-and-paper tests, while able to measure certain cognitive abilities (*e.g.*, reading and memorization) and factual knowledge, do not measure other skills and abilities critical to being an effective fire officer as well as alternative methods of testing do.") (citing MICHAEL A. TERPAK, ASSESSMENT CENTER: STRATEGY AND TACTICS 1 (2008) (asserting that "multiple-choice exams are 'known to be poor at measuring the knowledge and abilities of the candidate, most notably that of a fire officer'")). The term "fire officer" is used in contrast to the term "firefighter" to refer to higher-ranking firefighters with supervisory responsibilities over entry-level firefighters. *See id.* at 10.

71. *See* McGinley, *supra* note 9, at 599–600 (describing the changing nature of firefighters' jobs to include caretaking tasks that many white males denigrate relative to firefighting); *see also* Denise M. Hulett, Marc Bendick, Sheila Y. Thomas & Francine Moccio, *Enhancing Women's Inclusion in Firefighting in the USA*, 8 INT'L J. DIVERSITY ORG. COMMUNITIES & NATIONS 189, 190 (2008) (noting that nearly two-thirds of fire department calls are for medical assistance and that 65%

While facially neutral, these evaluation procedures were embedded in and the product of a set of interlocking presumptions about firefighting as (white) men's work. Disparate impact theory and doctrine is crucial to illuminating these presumptions, as it places the burden on Title VII employers to demonstrate that the tests and procedures they use are actually "merit-selecting."[72]

C. Women of Color and Firefighting—National Trends and Recent Examples

In this Part, I situate New Haven's practices in a broader context. First, I briefly review the history of the amendment to Title VII in 1991 as a way to illustrate the centrality of the experience of women and women of color to disparate impact law. I also examine the patterns of employment of women and women of color in the New Haven Fire Department against national data and trends. Finally, I consider recent disputes over hiring and working conditions for minorities and women in the New York and Los Angeles fire departments to illuminate the interlocking character of racism and sexism in this domain.

1. Historical Role of Women in Disparate Impact Doctrine

The exclusion of women and women of color from the *Ricci* story and litigation was a particularly problematic omission given the historical role of women in firefighting in defending disparate impact doctrine. Brenda Berkman, one of the handful of female firefighters in the Fire Department of New York, testified in support of the amendments to the Civil Rights Act of 1991 to correct the Supreme Court's decision in *Wards Cove Packing Co., Inc. v. Atonio*[73] among other decisions in the 1989 term adverse to minority plaintiffs charging discrimination.[74] In *Wards Cove* the plaintiffs charged both systemic disparate treatment and disparate impact in connection with Alaskan cannery employment practices that resulted in a racially skewed workforce in which skilled, higher paying jobs went to whites, while non-white workers were consigned to lower paying cannery jobs.[75] The Court in *Wards Cove* ruled against the plaintiffs because, in the majority's view, the proof did not sufficiently connect specific employment practices to particular outcomes, effectively raising the standard of proof for disparate impact claims.[76]

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of fire departments have assumed responsibility for emergency ambulance services in their jurisdiction).

72. *See* Harris & West-Faulcon, *supra* note 6, at 121 (internal quotation marks omitted).

73. 490 U.S. 642 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074.

74. *Civil Rights Act Hearings*, *supra* note 30, at 385.

75. *Wards Cove*, 490 U.S. at 642, 648.

76. *Id.* at 656–57 (reasoning that just as an employer cannot escape liability by demonstrating that their workforce is racially balanced, a plaintiff cannot support a disparate impact case simply by showing that there is racial imbalance—they must demonstrate that a specific employment practice has a disparate impact on the group in question).

In her testimony Berkman described the barriers she faced in becoming a firefighter. Although over 300 women passed the written test, only 88 took the physical test because of the rumor that no woman had ever passed it.[77] When Berkman failed the exam, she along with several other women, challenged the physical test because it produced a disparate impact on women.[78] The test was thrown out because there was no showing of business necessity—that is no showing of the relationship between performance on the test and performance on the job.[79] Berkman was finally hired pursuant to a court order, but as she testified, "Once hired, we were denied the ordinary amenities of cooperative firehouse living and subjected to daily sexual harassment and hazing. This included crude sexual comments, obscene graffiti and physical molestation."[80] Two of the women were terminated.[81] Berkman and Zeda Gonzales filed suit over the retaliation and won.[82] This proved to be critical evidence regarding the importance of the disparate impact framework, demonstrating why it was necessary to correct the Court's decision in *Wards Cove*. As Berkman put it, had she litigated her case under the *Wards Cove* standard, she would have lost.[83] Berkman's and Gonzales's narratives were crucial to preserving disparate impact doctrine.

2. National Context

New Haven's virtual exclusion of women, and women of color in particular, from firefighting jobs was part of a broader national pattern. The National Report on Women in Firefighting, published in 2008, documented the long history of exclusion of women from firefighting, the harassment that they faced doing the job, and the fact that this pattern has been stubbornly resistant to change. Nationwide, women are about 3.7% of the number of firefighters, and in a significant number of departments the number of women is even lower.[84] The latter group includes both New York City and Los Angeles,[85] cases that I consider here below as examples of the intersectional discrimination that remained obscured in *Ricci*. Other fire departments, such as Minneapolis, San Francisco, Miami, and Boulder have significantly higher proportions of women (from 13%–17%) and utilization has been closer to actual availability.[86] This

77. *Civil Rights Act Hearings*, *supra* note 30, at 380.
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.* at 380–81.
83. *Id.* at 381.
84. *See* HULETT ET AL., *supra* note 62, at 1.
85. *See id.*
86. *Id.* at 2 (listing several metropolitan areas with impressive percentages of women firefighters: Miami-Dade, FL at 13%; Boulder, CO at 14%; San Francisco, CA at 15%; Madison, WI at 15%; and Minneapolis, MN at 17%).

demonstrates that the exclusionary patterns present in New Haven were not unique but nor were they inevitable.

The report also documents that the situation for women of color is quite acute: While women of color would be expected to be about 5.9% of the profession, according to the figures drawn from the 2000 census, they constitute only 0.8% of firefighters.[87] That means that they are currently represented at only 13.6% of the expected numbers while white women are represented at 26% of the expected rate.[88] Underrepresentation of women of color is twice that of white women.[89] Notably, women of color also report in interviews that in addition to facing the stereotype that women

> "are not cut out for firefighting" . . . . [S]ome of their white women colleagues distance themselves from efforts by men of color to combat racism and improve departmental practices in areas such as promotions. These circumstances leave women of color feeling particularly isolated and inadequately supported by either women's or minority employee organizations.[90]

Other sociological studies tend to support the view that the experience of women of color in firefighting remains highly fraught, as racism and sexism interact to render them particularly vulnerable to discrimination.[91] By their own words, they contend that they are unable to identify whether a negative action was motivated by their racial identity or by their gender.[92]

3. New York and Los Angeles Through an Intersectional Lens: Big Cities, Big Problems

The hiring and promotional records of fire departments in New York and Los Angeles illustrate the entrenched nature of the sex- and race-based exclusion. While both cities are very racially diverse, this is not reflected in their fire departments. Women of color in particular have not fared well, and the patterns of intersectional vulnerabilities are quite stark. I more closely consider these patterns here to demonstrate how an

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87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.*
91. Janice D. Yoder & Patricia Aniakudo, *"Outsider Within" the Firehouse: Subordination and Difference in the Social Interactions of African American Women Firefighters*, 11 GENDER & SOC'Y 324, 332 (1997) (describing the difficulties facing Black women who are stereotyped as angry, aggressive, welfare recipients and "beasts of burden" (internal quotation marks omitted)). Like white women, Black women experienced hazing, close supervision, and frequent punishment; but unlike white women who are perceived as weak, the stereotype of Black women as beasts of burden increased expectations about the work they were expected to do. *Id.*
92. McGinley, *supra* note 9, at 609 (summarizing findings of the studies that it was impossible for Black women to assess whether they were being discriminated against on the basis of race or sex, but clearly experiencing the intersectional impact of both).

intersectional analysis provides a more accurate and compelling account of discrimination and is a source of important evidence to support the continued utility of the disparate impact framework. These cases might offer important examples of why the missing evidence in *Ricci* regarding the impact of New Haven's practices on women and on women of color in particular was such a costly omission.

a. Los Angeles

While Los Angeles is a majority-minority city—29% of the residents are white—this diversity is not reflected its fire department (LAFD).[93] Specifically, over 50% of the department is white, 31% is Latino, 12% is Black, and 7% is Asian-American.[94] Even more significant is the underutilization of women who comprise only 3% of the uniformed ranks, the same as in 1995.[95]

Actions by the Equal Employment Opportunity Commission (EEOC) against the LAFD underscore that the employment record with regard to women is not a function of women's lack of interest in the job or natural sorting. In 2007, not long after a thirty-year-old federal consent decree proscribing discrimination against women and minorities had expired, the EEOC intervened following several high-profile harassment and retaliation cases.[96] One involved a Black male firefighter, Tennie Pierce, who sued for discrimination and retaliation that included charges that his coworkers had mixed dog food in with his meal.[97] Pierce's settlement for $1.4 million was initially approved by the city council and was later vetoed by the mayor following media controversy over claims that Pierce had participated in some hazing.[98] In another case, Brenda Lee, a Black lesbian firefighter, won a $6.2 million dollar award in a jury trial based on charges of repeated harassment and retaliation.[99] The verdict was reversed on appeal on technical grounds and remanded.[100] Lee's

93. Michael Finnegan, Ben Welsh & Robert J. Lopez, *New LAFD Recruit Class is Nearly All Male, Overwhelmingly White*, L.A. TIMES (Jan. 6, 2014, 8:13 PM), http://www.latimes.com/local/lanow/la-me-ln-new-lafd-recruit-class-nearly-all-male-overwhelmingly-white-20140106-story.html.

94. *Id.*

95. *Id.*

96. Kerry Cavanaugh & Beth Barrett, *Feds Find Evidence LAFD Violates Rights of its Women, Blacks*, L.A. DAILY NEWS (Oct. 2, 2007, 9:00 PM), http://www.dailynews.com/general-news/20071003/feds-find-evidence-lafd-violates-rights-of-its-women-blacks.

97. *Id.*

98. *Id.*

99. Lee v. City of Los Angeles, No. BC336783, 2007 WL 5506484 (Cal. Super. Ct. July 12, 2007), *rev'd*, No. B202865, 2010 WL 553022 (Cal. Ct. App. Feb. 18, 2010).

100. Lee v. City of Los Angeles, No. B202865, 2010 WL 553022 (Cal. Ct. App. Feb. 18, 2010), *rev'g* No. BC336783, 2007 WL 5506484 (Cal. Super. Ct. July 12, 2007). The reversal in Lee's case was primarily based on an asserted failure to exhaust administrative remedies, so that the court lacked jurisdiction to consider important aspects of her claim. The verdict was significant, nevertheless. As one commentator noted:

> The 2007 jury decision was reportedly the largest in a line of case settlements involving discrimination and retaliation against minorities and women within the fire department in

coplaintiffs, white firefighters who charged they were retaliated against for attempting to assist her, both won significant awards: $1.7 million in one case and $350,000 in another.[101] The first Black female firefighter serving in the LAFD, d'Lisa Davies, also recovered $325,000 in a case involving charges of discrimination over two decades of service.[102] The cases revealed ongoing patterns of racial and gender exclusionary conduct—conduct that has resulted in over $16 million in verdicts and settlements against the city since 2005.[103]

Recent events have disclosed that despite the EEOC investigation and public denunciations of the department's practices by public officials, the exclusion of women has continued. In January 2014, the first recruit class of seventy firefighters in five years is over 60% white and includes only one woman.[104] The group does include thirteen sons and three nephews of current firefighters.[105] Reports of nepotism, irregular procedures, and selective disclosure of applications have resulted in a decision to temporarily suspend additional recruitment.[106]

> Los Angeles. The cases have allegedly cost Los Angeles taxpayers more than $15 million since 2005. In a 2007 letter to the fire department, the Equal Employment Opportunity Commission concluded that there had been a pattern of harassment, discrimination and retaliation against female and black firefighters, where federal civil rights laws had been violated.
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> . . . .
>
> After allegations of sexual and racial discrimination surfaced in the Los Angeles fire department, former Fire Chief William Bamattre reportedly retired early, in 2007.

California Court Overturns Female Firefighter's Racial, Gender Discrimination Case, HOWARD LAW, P.C. (Feb. 18, 2010), http://www.howardlawpc.com/lawyer-attorney-2237175.html.

101. Bill Hetherman, *LAFD Firefighter Discrimination Case Winding Down*, U-T SAN DIEGO (July 3, 2007, 12:00 AM), http://www.utsandiego.com/news/2007/jul/03/lafd-firefighter-discrimination-case-winding-down/2/?#article-copy.

102. Michael Finnegan & Ben Welsh, *Next L.A. Fire Chief's Other Challenge: Race and Sex Discrimination*, L.A. TIMES (Dec. 1, 2013), http://articles.latimes.com/2013/dec/01/local/la-me-fire-discrimination-20131202.

103. Cavanaugh & Barrett, *supra* note 96.

104. Finnegan et al., *supra* note 93.

105. City News Service, *L.A. Fire Department Graduates First Class of Recruits in 5 Years, but No Women Included*, L.A. DAILY NEWS (June 12, 2014, 3:51 PM), http://www.dailynews.com/general-news/20140612/la-fire-department-graduates-first-class-of-recruits-in-5-years-but-no-women-included.

106. According to one report, the problems were sufficiently severe that earlier in 2014 the mayor temporarily suspended the recruitment program:

> Los Angeles Mayor Eric Garcetti suspended the city's firefighter recruitment program Thursday amid concerns about mismanagement and nepotism, including new emails that show special recruitment workshops were organized for relatives of department insiders.
>
> "I have determined that the Fire Department's recruiting process is fatally flawed," the mayor said in a statement Thursday.
>
> The action follows a Times report last month that thousands of candidates who passed a written test were excluded from consideration for a new training class because some of their paperwork wasn't received in the first 60 seconds of a filing period last spring. Nearly 25% of the 70 recruits eventually hired were related to LAFD firefighters.

Robert J. Lopez & Ben Welsh, *LAFD Recruit Program is Suspended*, L.A. TIMES (Mar. 20, 2014), http://articles.latimes.com/print/2014/mar/20/local/la-me-lafd-20140321.

b. New York City

New York City's fire department (FDNY) presents one of the most stark and persistent records of underutilization of women and women of color in the country. Although the city's overall population is approximately 30% Latino, 25%–30% Black, 10% Asian, and 51% women, fewer than 6% of FDNY's 11,000 firefighters are men of color, and women comprise only 0.3% of the total.[107] In testimony before the city Council of New York City, Marc Bendick, the social scientist who was one of the authors of the national study, pointed out that were women treated equally as men at FDNY, there would be over 1,800 women rather than the current number of 100 uniformed personnel (including firefighters and emergency medical technicians).[108] This record, he opined, was more than sufficient to establish a prima facie case of gender discrimination against the FDNY.[109] For the past six years the city has been in litigation over its record with regard to race and has recently reached a settlement.[110]

According to the President of the United Women Firefighters, Sarinya Srisakul, (who is also New York City's first Asian-American female firefighter) the city's record is a predictable consequence of its practices of utilizing extra, and arguably illegal, physical tests that make impose additional requirements even on those candidates who have already passed the Candidate Physical Ability Test (CPAT)—a test widely used in departments across the country in physical screening.[111] She contended, "What is happening is that the Department is forced to use these entrance standards that promote diversity that they don't agree with, so they put harder standards in academy to weed them out."[112] This comports with Bendick's testimony that the "outcome [in the FDNY] is directly traceable to a departmental culture in which hostility, discrimination, harassment, and exclusion operate."[113]

What is quite remarkable is that the issues and barriers confronting women and people of color today so closely mirror the concerns raised regarding FDNY practices over three decades ago. Berkman's account of

107. *Test of Courage: The Making of a Firefighter*, PBS, http://www.pbs.org/itvs/testofcourage/diversity3.html (last visited Aug. 26, 2014).

108. Bendick, *supra* note 68, at 3.

109. *Id.* at 8.

110. *See* United States v. City of New York, 717 F.3d 72 (2d Cir. 2013), *rev'g* 683 F. Supp. 2d 225 (E.D.N.Y. 2010), *aff'g* 637 F. Supp. 2d 77 (E.D.N.Y. 2009); United States v. City of New York: *FDNY Employment Discrimination Case*, CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, http://www.justice.gov/crt/spec_topics/fdny/ (last visited Nov. 30, 2014) (discussing the settlement). The settlement calls for new written exams, eliminating nepotism from the personnel board that has a role in hires, and addressing pay. Mary Emily O'Hara, *Bill De Blasio's Diversity Opportunity*, THE DAILY BEAST (Jan. 12, 2014), http://www.thedailybeast.com/articles/2014/01/12/bill-de-blasio-s-diversity-opportunity.html.

111. O'Hara, *supra* note 110.

112. *Id.* (internal quotation marks omitted).

113. Bendick, *supra* note 68, at 1–2.

the barriers that were placed in the path of women seeking to enter the department, and in particular the use of physical screening exams to weed out candidates, presages, and comports with contemporary allegations.[114] The fact that the same discredited rationales regarding the suitability of women are in circulation as an explanation for FDNY's record is quite telling.

Berkman's account also reveals important dimensions of an intersectional framework. While the discourses and logics of race- and sex-based exclusion are not the same, they are often mobilized in tandem, and have interactive effects. Berkman's personal narrative reflects a recognition that a crucial source of support for her throughout her long ordeal with the FDNY was the Organization of Black Firefighters.[115]

As this Part demonstrates, the stories of women and of women of color in particular have been an important part of challenging the exclusionary practices of fire departments across the nation. The fact that they were omitted from the discussion in *Ricci* represented a failure to consider the insights offered by an intersectional analysis. This next Part con-

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114. Berkman testified before the House Committee on the Civil Rights Act of 1991 regarding the reason that *Wards Cove* needed to be corrected, stating:

> I took the written test in December of 1977, with 409 other women and over 24,000 men. Almost all of us passed the written test. Although 389 women passed the written test, only 88 took the physical test because it was rumored that no woman could pass it.
>
> We were required to complete seven tests: a dummy carry, a hand grip, a broad jump, a flexed-arm hang, an agility test, a ledge walk, and a one-mile run. The rumor turned out to be accurate: although 7,847 men passed the physical exam, not a single woman passed it.
>
> I decided to challenge the test because I did not believe that it tested fairly for the skills needed to be an effective firefighter. The trial court found that the test had a disparate impact on women. The judge also held that the City failed to prove business necessity, because the abilities tested by the physical exam were not predictive of job performance.
>
> . . . .
>
> The judge also found that carrying a dummy with no arms or legs was more difficult than carrying a real person. I was unable to carry the 120-lb. dummy, as were 76 of the 80 women who tried, but at trial I carried my 180-lb. counsel across the courtroom to show the judge I could carry a live person.
>
> . . . .
>
> The judge invalidated the physical tests as a violation of Title VII.
>
> . . . I was ultimately hired in 1982, with 41 other women.
>
> . . . Once hired, we were denied the ordinary amenities of cooperative firehouse living and subjected to daily sexual harassment and hazing. This included crude sexual comments, obscene graffiti and physical molestation.
>
> After one year I was terminated, along with Zeda Gonzales, another female firefighter. We challenged the terminations in court, and the judge held that we had been discharged in retaliation for playing a prominent role in the lawsuit.
>
> . . . .
>
> I am here today to express my strong support for the Civil Rights Act of 1991. I do not believe I would have won my case under the principles set forth in *Wards Cove* . . . .
>
> . . . .
>
> If *Wards Cove* had been decided in1979, rather than 1989, New York City would probably still not have a single woman firefighter.

Civil Rights Act Hearings, *supra* note 30, at 380–81 (statement of Brenda Berkman, President, United Women Firefighters).

115. Event, *Taking the Heat*, *supra* note 69, at 723 (calling the Black firefighters organization the "biggest single [source of] support").

siders the seeming hypervisibility of race and gender in the context of Justice Sotomayor's nomination and the simultaneous masking of racialist and gendered frames and presumptions. The *Ricci* case figured prominently in this discourse.

II. *RICCI*, RACE, AND GENDER IN THE SOTOMAYOR NOMINATION

It was very hot in Washington, D.C. during the summer of 2010, but not just because of the temperature outdoors. The Judiciary Committee was conducting what had become highly contentious hearings on the nomination of Judge Sonia Sotomayor to the Supreme Court.[116] Initially, it did not appear that Sotomayor's candidacy would cause significant controversy. As Obama's first nominee to the Court, [117] he touted her "depth of experience" and "breadth of perspective,"[118] implying that these virtues would imbue her with empathy—a quality he had previously extolled.[119] Implicit, if not explicit, in the initial reactions was a positive response to the fact that she was the first Supreme Court nominee from the Latino community.[120] That community embraced her as a symbol of rising political influence notwithstanding her gender identity.[121] This seemed to mark some distance from the representational politics that rendered Black women less visible and less able than Black men to embody antiracist aspirations and be the standard bearers of racial justice.[122] Thus, to the extent that Sotomayor's nomination was celebrated in the Latino community as representative of racial progress, the story seemed

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116. *See Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor, to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. (2009), *available at* http://www.gpo.gov/fdsys/pkg/CHRG-111shrg56940/html/CHRG-111shrg56940.htm.

117. *See* Peter Baker & Jeff Zeleny, *Obama Hails Judge as 'Inspiring,'* N.Y. TIMES (May 26, 2009), http://www.nytimes.com/2009/05/27/us/politics/27court.html?scp=1&sq=obama%20choose%20hispanic%20judge&st=cse.

118. Press Release, The White House, Remarks by the President in Nominating Judge Sonia Sotomayor to the United States Supreme Court (May 26, 2009), *available at* http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-in-Nominating-Judge-Sonia-Sotomayor-to-the-United-States-Supreme-Court.

119. Press Release, The White House, Remarks by the President on Justice David Souter (May 1, 2009), *available at* http://www.whitehouse.gov/the-press-office/remarks-president-justice-david-souter ("I view that quality of empathy, of understanding and identifying with people's hopes and struggles as an essential ingredient for arriving as just decisions and outcomes.").

120. *See* Baker & Zeleny, *supra* note 117.

121. Tricia Bishop, *A Cause for Celebration: Sotomayor Nomination to High Court Raises Latino Pride*, BALT. SUN, June 29, 2009, at 4A; Joye Brown, *Calls of Praise for Sotomayor*, NEWSDAY, July 15, 2009, at A28; Bart Jones, *Local Latino Leaders Herald High Court Pick*, NEWSDAY, May 27, 2009, at A05; Kent A. Miles, *Local Support for Sotomayor*, ATL. J. & CONST., May 27, 2009, at A12; Víctor Manuel Ramos, *Sotomayor's Nomination is Source of Pride for Hispanics in Central Florida*, ORLANDO SENTINEL, May 27, 2009, at A10; Ted Roelofs, *'I am Very Proud' Hispanic Residents of West Michigan Closely Watch Confirmation Hearings*, GRAND RAPIDS PRESS, July 14, 2009, at A1.

122. *See supra* note 39 and accompanying text (discussing the Thomas nomination to the Supreme Court and the fact that Black women were not able to represent the race, while he was able to garner support by asserting that the hearings were a "hi-tech lynching").

to offer a hopeful counterpoint to the problem Crenshaw so powerfully identified with reference to the issue of Black women and antiracism.[123]

Yet, the initial celebratory atmosphere proved to be short-lived. Two lines of attack emerged, in some ways complementing and underwriting the same message. First, Sotomayor's identity as a Latina that had been mobilized as a symbol of advancing racial equality became the mark of bias.[124] In a sense, her intersectional identity as a woman of color became an albatross and rendered her hypervisible. Second, the Supreme Court's decision reversing her opinion in *Ricci* became evidence of her alleged racial loyalty and impeached her assertion of impartiality. Had she been white and ruled in Ricci's favor, her objectivity likely would not have been questioned, as her decision would not have disrupted prevailing expectations. These critiques problematically relied on the presumptions that her identity as a woman of color made her less likely to be fair in contrast to whites whose racial identity is affiliated with neutrality and objectivity.

This Part considers how *Ricci* functioned to construct Sotomayor's identity as a woman of color who was presumptively biased and a "reverse racist." Even though Sotomayor ultimately was confirmed by the Senate, the constraints imposed by the underlying racial presumptions reproduced an alignment between racial minority affiliations and anti-white bias. This reinforced arguments subsequently deployed in other presidential appointment hearings.[125] Of course, the opposition to President Obama's nominees was never short of reasons to support its position. However, this particular narrative had great utility in connection with President Obama's judicial and cabinet appointments. In this sense, Sotomayor's confirmation is less an illustration of majoritarian power and is more demonstrative of the imperatives of colorblindness as a legitimate litmus test of objectivity and judicial temperament and a presumed characteristic of whites. Utilizing the tools of intersectional analysis would have challenged these assumptions. This was crucial in resetting the terms of engagement around not only Sotomayor's appointment but in securing political space for future nominees of color.

A. Ricci *as Evidence of Sotomayor's Alleged Bias*

New Haven had also been sued by the Firebirds several times, a minority firefighter's organization, over its promotional practices and so it knew that it faced serious consequences if it failed to have a fair selection process.[126] Accordingly, once it was clear that the city's test and its

123. *See* discussion, *supra* Part I.A.

124. Peter Wallsten, *More in GOP Make Race Focus of Sotomayor Nomination: They Allege She Wouldn't Be Fair to White Men*, BOS. GLOBE, June 1, 2009, at 6.

125. *See infra* note 142.

126. *See generally* Firebird Soc'y of New Haven, Inc. v. New Haven Bd. Of Fire Comm'rs, 66 F.R.D. 457 (D. Conn. 1975), *aff'd mem.*, 515 F.2d 504 (2d Cir. 1975).

method of scoring the exam produced hugely racially disparate results—virtually no Black or Latino would be promoted—the city cancelled the test results out of concern regarding disparate impact liability.[127] It was also particularly concerned that it could not demonstrate that less discriminatory alternatives were unavailable.[128] Nevertheless, the *Ricci* plaintiffs, all white and one Latino, challenged the city's action as unlawful disparate treatment discrimination. Their theory was that the city's cancellation of the test amounted to discriminating against white candidates on the basis of race.[129] Arguably, this was a novel interpretation of Title VII—essentially claiming that taking account of the results of the test by race constituted an illegitimate racial motive.[130] Sotomayor served on the panel in the Second Circuit that ruled in favor of the city.[131]

Once the Supreme Court reversed that ruling and found for the *Ricci* plaintiffs, Sotomayor's ruling was challenged as evidence that her identity—as a Latina—trumped her willingness to adhere to the law.[132] She was simply engaged in racial self-aggrandizement. This argument ignored the fact that the *Ricci* decision reshaped existing doctrine: Sotomayor's opinion followed what had been the prevailing consensus about the law before the Supreme Court's decision in *Ricci*.[133] One can dispute whether that consensus was correct, but Sotomayor's decision was grounded in a reasonable reading of the doctrine.[134]

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127. A.G. Sulzberger, *Bias Suit a Test of Resolve for Hispanic Man*, N.Y. TIMES (July 2, 2009), http://www.nytimes.com/2009/07/03/nyregion/03firefighter.html.

128. *See* Ricci v. DeStefano, 557 U.S. 557, 587 (2009).

129. *Id.* at 563.

130. *See id.*

131. *See* Ricci v. DeStefano, 530 F.3d 87 (2d Cir. 2008) (per curiam), *rev'd* 557 U.S. 557 (2009).

132. *See, e.g.*, Christopher Caldwell, *The Limits of Empathy for Sonia Sotomayor*, TIME, June 8, 2009, at 32 (describing Sotomayor's decision in the *Ricci* case as a defense of "racial preferences"); David Paul Kuhn, *Left Dodges Moral Debate on* Ricci *Case*, REAL CLEAR POLITICS (June 30, 2009), http://www.realclearpolitics.com/articles/2009/06/30/left_dodges_moral_debate_on_ricci_case.html (describing the dissenting opinion in *Ricci* as "uph[olding] the city's effort to find any means to hold fast to conventional affirmative action").

133. Paul Bass, *Firebirds, NAACP:* Ricci *Won't Stop Us*, NEW HAVEN INDEP. (June 30, 2009, 5:03 PM), http://newhavenindependent.org/archives/2009/06/the_supreme_cou_1.php.

134. *See 'Hardball with Chris Matthews' for Monday, July 13*, NBCNEWS, http://www.msnbc.msn.com/id/31905856/ns/msnbc_tv-hardball_with_chris_matthews (last updated July 14, 2009) (quoting Senator Durbin's response to a question Chris Matthews posed regarding Senator Durbin's opinion of Justice Sotomayor's decision in *Ricci*: "I think her ruling was the only ruling that she could have handed down. It reflected 38 years of court decisions. It reflected the trial court's decision, the appellate panel's decision, and the full appellate court, and she joined in to what was clearly the precedent. Along came the Supreme Court, and by a 5 to 4 vote, a very close vote, turned it over and said, We're going to do it differently. How can you hold that against her? I mean, she was really taking the law as given to her over the years and applying the law to the set of facts she was given"); *Wade Henderson Testifies at Sonia Sotomayor's Confirmation Hearings*, WASH. POST (July 16, 2009 4:20 PM), http://www.washingtonpost.com/wp-dyn/content/article/2009/07/16/AR2009071603085.html ("Judge Sotomayor has participated in thousands of cases and authored hundreds of opinions, but much of the debate about her nomination has concentrated on the difficult case of *Ricci v. DeStefano*. Whatever one may feel about the facts of this case, we all agree that the Supreme Court, in its *Ricci* decision, set a new standard for inter-

Ricci himself was a central witness called before the Judiciary Committee to testify against Sotomayor's nomination.[135] His story of prevailing over adversity and achieving according to merit-based standards was largely uncontested. No Black male or female firefighter of any race testified before the Senate about the egregious and ongoing patterns of discrimination that had kept New Haven's Fire Department, and its supervisory structure, predominately white and overwhelmingly male. This systemic privilege was invisible, outside the purview of commentary.

Moreover, it is also important to note the asymmetrical nature of the significance ascribed to racial and gender identity. Ricci's racial identity and that of the Justices in the majority, did not perform similar delegitimizing work nor call into question particular judgments or claims. Put differently, Ricci's identity as a white male, a class that had historically and continually benefited from the existing distribution of power and resources, did not undermine the perceived legitimacy of his arguments.

In contrast, Sotomayor's identity was not only grounds for suspicion: A second line of attack opened up based on the now infamous comment in which she invoked her own identity at the intersection of race and gender. In comments in a 2002 keynote speech given to a conference organized by Latino Students on Latinos and Latinas in the judiciary, she stated, "I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn't lived that life."[136] As the crescendo of criticism swelled, President Obama walked it back for her stating, "I'm sure she would have restated it."[137] Thus, the very life experience fighting prejudice and discrimination as a Latina that shapes, influences, and affects viewpoint—experience that conservatives like Clarence Thomas have repeatedly invoked[138]—became something to be disavowed.

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preting Title VII of the '64 Civil Rights Act. Using this one decision to negate Judge Sotomayor's 17 years on the bench does a disservice to her record and to this country."); *see also* Hayden v. County of Nassau, 180 F.3d 42, 49, 51 (2d Cir. 1999) (citing Raso v. Lago, 135 F.3d 11, 16 (1st Cir. 1998)) (holding that reducing adverse impact on minorities does not equate to reverse discrimination against whites, stating that "the intent to remedy the disparate impact of the prior exams is not equivalent to an intent to discriminate against non-minority applicants"); Harris & West-Faulcon, *supra* note 6, at 82 (noting that "Prior to Ricci, the Court had never held that an employer risks Title VII disparate treatment liability for failing to use an employment test that produces racially adverse impact").

135. *See Continuation of the Nomination of Sonia Sotomayor to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Judiciary Comm.*, 111th Cong. (2009), *available at* http://www.judiciary.senate.gov/meetings/continuation-of-the-nomination-of-sonia-sotomayor-to-be-an-associate-justice-of-the-supreme-court-of-the-united-states-2009-07-16.

136. Sonia Sotomayor, *A Latina Judge's Voice*, 13 BERKELEY LA RAZA L.J. 87, 92 (2002).

137. *Obama Calls Criticism of Sotomayor 'Nonsense,'* NBC NEWS (May 29, 2009, 6:43 PM), http://www.nbcnews.com/id/31004091/ns/politics-white_house/t/obama-calls-criticism-sotomayor-nonsense/#.U_UMY_ldXT8.

138. In his autobiography, *My Grandfather's Son*, Thomas relates his experience as a poor Black child in a culturally distinct African-American community in rural Georgia who grew up

B. Ricci*'s Lingering Effects*

Even though these attacks had no impact on Justice Sotomayor's actual confirmation, they arguably served to undermine the nominee in the eyes of the broader public. The terms upon which her nomination was challenged, as Kevin Johnson pointed out, were deeply infected by race and gender stereotypes about Latinas: She was deemed to lack judicial temperament.[139] Other opponents in Congress asserted that she had "lots of 'splaining to do," invoking an imagined accent and phrase drawn from Ricky Ricardo's character on *I Love Lucy*.[140]

Sotomayor's confirmation required her to perform and completely disavow any meaningful connection with antiracist organizations or causes. Her affiliations were demonized. The National Council of La Raza and the Puerto Rican Legal Defense Fund were both called racist organizations; the National Council of La Raza was called the Latino equivalent of the KKK.[141] Certainly, while this tactic was not new, the debate intensified and affirmed those dynamics.

These dynamics and constraints have extended beyond the Justice's nomination. The relentless political opposition to President Obama has affected his ability to appoint various officers and cabinet positions, in part by narrowing the political space in which civil rights advocacy has operated.[142] At times, as in the case of Justice Sotomayor, even moderate

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under segregation and racial subordination. *See generally* CLARENCE THOMAS, MY GRANDFATHER'S SON 1–28 (2007). Thus, while Thomas is a vocal conservative who endorses colorblindness, he does so from a racially specific position that draws on what he sees as the lessons from this history about overcoming racial obstacles. *See* Devon W. Carbado & Cheryl I. Harris, *The New Racial Preferences*, 96 CAL. L. REV. 1139, 1174–76 (2008).

139. *See* Kevin R. Johnson, *An Essay on the Nomination and Confirmation of the First Latina Justice on the U.S. Supreme Court: The 'High-Tech Lynching' of a 'Wise Latina'?* 20–21, 43–49, (UC Davis Legal Studies Paper Series, Research Paper No. 188, 2009), *available at* http://ssrn.com/abstract=1460932.

140. Sheryl Gay Stolberg & Neil A. Lewis, *Queries on Abortion and Guns Fail to Break Judge's Stride*, N.Y. TIMES (July 15, 2009), http://www.nytimes.com/2009/07/16/us/politics/16confirm.html (internal quotation mark omitted).

141. *See, e.g.*, Johnson, *supra* note 139, at 45; Susan Crile, *Tancredo Claims Sotomayor in "Latino KKK,"* HUFFINGTON POST (June 28, 2009, 5:12 AM), http://www.huffingtonpost.com/2009/05/28/tancredo-claims-sotomayor_n_208831.html.

142. Prime examples here would be the unsuccessful nomination of Goodwin Liu to the federal court of appeals where his liberal credentials became the basis for allegations that he was extremely radical. *See* Ed Whelan, *Ninth Circuit Nominee Goodwin Liu*, NAT'L REV. ONLINE (Feb. 24, 2010, 5:34 PM), http://www.nationalreview.com/bench-memos/49270/ninth-circuit-nominee-goodwin-liu/ed-whelan (describing the nominee as "demagogic" in prior opposition to Alito and as aligned with "left-wing groups" like the ACLU, the National Women's Center, and the American Constitution Society). Some of the accusations took on a distinctly racialized tone. *See* Ian Millhiser, Op-ed., *The Goodwin Liu Nomination: Impaired Judgment*, L.A. TIMES, June 1, 2011, at 15 (reporting that Senator Grassley accused Liu of attempting to make the United States be more like "communist run China" (internal quotation marks omitted)). Liu was subsequently nominated and appointed to the California Supreme Court. *See* Maura Dolan, *Accolades as Justice Confirmed: Newest Member of State Supreme Court Had Contentious Federal Nomination*, L.A. TIMES, Sept. 1, 2011, at 1. Another concern is the derailment of the nomination of Debo Adegbile, former counsel for the NAACP Legal Defense Fund, to be the Assistant Attorney General for the Justice Department's Civil Rights Division. *See* Dahlia Lithwick, *Guilt By Association*, SLATE (Mar. 5, 2014),

candidates are opposed as radical extremists. These constraints stand against the backdrop of a federal judiciary that over the past several decades has plainly been reshaped in accordance with conservative political preferences.[143] Yet any arguments on behalf of appointments of more centrist or liberal judges are denounced as efforts to politicize the courts.[144] Certainly, the recent decision to move away from the requirement of a supermajority to confirm judicial nominees is a positive sign,[145] but the terms of the debate are still framed by a narrative that erases the political advocacy and conservative racial preferences that installed the current bench.

In response, the Obama administration's approach to judicial nominees has been shaped by conservative resistance: The strategy is to nominate only those persons who will not engender resistance.[146] Note that affiliation with, or even leadership in, the Federalist Society should apparently engender no concerns about ideological orientation or commitments.[147]

The framing of Sotomayor as anti-white reinforces the view of the status quo as race neutral and affirms whiteness as a legitimate baseline. Bias is defined as seeing race as relevant. Thus what might be thought of as race attentiveness per se—simply noticing race—is a form of racial discrimination against whites. This was the Court's position in *Ricci*. The distorted debate over the Sotomayor nomination reproduced that same logic.

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http://www.slate.com/articles/news_and_politics/jurisprudence/2014/03/debo_adegbile_senate_blocks_obama_s_pick_to_head_the_justice_department.html (reporting that the "Senate block[ed] Obama's [nominee] to head the civil rights division because he's fought for civil rights").

143. *See* Rebecca Adelman & Amanda Haynes Young, *Judicial Activism: Just Do It*, 24 MEMPHIS ST. U. L. REV. 267, 269 (1994); Martin Garbus, *A Hostile Takeover*, AM. PROSPECT, Feb. 19, 2003, http://prospect.org/article/hostile-takeover; Jamin Raskin, *Courts v. Citizens*, AM. PROSPECT, Apr. 16, 2003, http://prospect.org/article/courts-v-citizens; *see also* Charlie Savage, *Appeals Courts Pushed to Right by Bush Choices*, N.Y. TIMES, Oct. 28, 2008, http://www.nytimes.com/2008/10/29/us/29judges.html.

144. *See* Harold Maass, *Is Obama Trying to Stack the Courts with Liberals?*, WEEK, http://theweek.com/articles/463909/obama-trying-stack-courts-liberals (reporting on Republican accusations to that effect).

145. *See* Paul Kane, *Reid, Democrats Trigger 'Nuclear' Option; Eliminate Most Filibusters on Nominees*, WASH. POST (Nov. 21, 2013), http://www.washingtonpost.com/politics/senate-poised-to-limit-filibusters-in-party-line-vote-that-would-alter-centuries-of-precedent/2013/11/21/d065cfe8-52b6-11e3-9fe0-fd2ca728e67c_story.html.

146. This strategy has not been entirely successful. Even nominees who lack any visible political commitments have been rejected. *See* Linda Greenhouse, Op-ed., *Rock Bottom*, N.Y. TIMES, Dec. 14, 2011 (reporting on the Republicans' successful defeat of Caitlin Halligan's nomination to the D.C. Circuit Court of Appeals by filibuster even though she was someone whose credentials bore no "ideological markings").

147. *See, e.g.*, Savage, *supra* note 143 ("David M. McIntosh, a co-founder and vice-chairman of the Federalist Society, said the nation's appeals courts were now more in line with a conservative judicial ideology than at any other time in memory. 'The level of thoughtfulness among sitting judges on constitutional theory and the role of judges is higher than certainly any other time in my life,' said Mr. McIntosh, a former Reagan legal team member and Indiana congressman. 'For somebody who has spent a lot of my life promoting those ideas, it's very encouraging to see.'").

CONCLUSION

The *Ricci* case, while ostensibly a case about race alone was in fact a case about multiple mechanisms of exclusion. Indeed, understanding the way that racial privilege had been constructed and configured in the New Haven Fire Department required an examination of its gendered dimensions. The lack of any intersectional perspective that illuminated these connections deprived those who opposed Frank Ricci's simple story of hard work, and colorblind merit of important evidence to challenge that presupposition. In that sense, while *Ricci* might nevertheless have been decided in the same way, the important work of resetting the racial narrative is performed not only through the actual decision in the case but in the framing of the debate. In that sense, an analysis of the experience of women of color as part of and representative of the excluded class of women offered critical insights into important connections.

While the invisibility of gender was a feature of the debate over the *Ricci* case, the hypervisibility of race and gender marked the nomination and confirmation of Justice Sonia Sotomayor to the U.S. Supreme Court. *Ricci* here played a role in helping organize the narrative that she was biased and, therefore, could not fulfill her duties to remain neutral and objective like her white counterparts. The rapid mobilization of these readily available stereotypes illustrates not only the particular vulnerability of women of color to bias, but further illuminates one of the central mechanisms of structural inequality, which is to treat the racially unequal status quo as neutral and fair. Intersectional analysis in both domains can yield greater insight that is valuable in its own right and indispensable in the context of antiracist and feminist politics, as it can enable greater and broader coalitional work and additionally, better articulate the operation of and interrelationship between race and gender subordination.